UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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REED GALIN,

Plaintiff,

v. 15 CV 6992 (JMF)

KUNITAKE HAMADA,

Defendant.

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New York, N.Y.
June 15, 2016
3:31 p.m.

Before:

HON. JESSE M. FURMAN

District Judge

APPEARANCES

RICHARD ALLEN ALTMAN
Attorney for Plaintiff

JOHN CAHILL
PAUL COSSU
Attorneys for Defendant

(In open court; case called)

MR. ALTMAN: For the plaintiff Reed Galin, Richard Altman.

MR. CAHILL: John Cahill from Cahill LLP for the defendant, Mr. Hamada. With me is Paul Cossu of our firm in case I have to run out. Also, with your Honor's permission, is a summer associate Shieva Salehnia, if she may be permitted, even though she's not technically admitted to the bar. Some day she will.

THE COURT: I have confident she will. She is granted permission to sit at counsel table. So welcome and good luck to you this summer.

We have here for the initial pretrial conference. Obviously, have some familiarity with the case from the motion to dismiss and my decision in connection with that motion.

I've read your joint letter of June 9.

Mr. Altman, tell me your views on whether discovery should be limited in the first instance to the circumstances surrounding the transfer of the painting to the Coe-Kerr Gallery if that's how it's pronounced.

MR. ALTMAN: Coe-Kerr Gallery.

My position is it should not be so limited. The circumstances of the transaction that Mr. Hamada engaged in are very much material to any decision on the case. He is claiming essentially to be a good faith purchaser. And so the question

is a matter of fact and a matter of expert opinion as to what's an appropriate amount of diligence under the circumstances.

If your Honor will recall, in the catalog, the auction catalog entry, reference is made to the fact that Mr. Ramus was the prior owner. And certainly anybody who is about to invest money in the art world at this time would have known or should have known of Mr. Ramus's reputation and activities and criminal convictions.

THE COURT: Can I interrupt for a second.

MR. ALTMAN: Please.

THE COURT: Because to my knowledge, I have already rejected the argument that the transfer to Mr. Hamada has any bearing on whether the entrustment provision applies. In my view, as articulated in my opinion, that turns entirely on the circumstances surrounding the transfer from Mr. Ramus to the Coe-Kerr Gallery at which point, as I understand it, the world didn't get note about Mr. Ramus's notoriousness and nefarious dealings.

MR. ALTMAN: That's not been established either.

THE COURT: Maybe so. But that's why I've denied the motion to dismiss, because it's a defense and it wasn't clear on the face of the complaint.

But my point is that as a legal matter I think if the entrustment provision applies, it applies because of the transfer from Mr. Ramus to Coe-Kerr Gallery. And then all

subsequent purchasers thereafter have good title or stand in the shoes essentially of the Coe-Kerr Gallery. And it doesn't matter whether Mr. Hamada, at the point that he bought it, had reason to believe that Mr. Ramus may have not had the rights to sell it.

So I think I have rejected that argument. You have preserved your rights to appeal it if you ultimately think it's wrong, but I don't see that as an argument or a basis to have broader discovery.

So the next argument.

MR. ALTMAN: The next argument for further discovery?

THE COURT: Yes.

In other words, my view -- I mean I think it was a pretty close call whether I could grant the motion on the basis of the entrustment provision. I didn't think I could for the reasons that I articulated in my opinion. But my intuition tells me that it may well ultimately prevail after discovery.

But I think for that reason, although I'm not usually a fan of limiting discovery because in my experience -- well, it depends. I like to be careful about it. Here I think it probably is appropriate because it may well dispose of the case, obviously subject to whatever appellate rights you want to pursue if it turns out that I'm wrong about what I've just said. And if I'm wrong, then we can proceed to broader discovery with respect to the rest of the matter. But it

strikes me that that's the way to go here.

Tell me another reason why you think it's not; otherwise, let's talk about a schedule.

MR. ALTMAN: Your Honor, I have made my point. I believe that I should have discovery from the defendant as to the circumstances of this transaction. You are, by cutting off any discovery rights against him or from him, you are essentially reaching the conclusion that he's an innocent party. I have no idea whether he's an innocent party or not. I don't know what the circumstances were of the transaction and you cannot automatically assume, I believe, that just because -- even if -- even if this was an entrustment and even if the Coe-Kerr Gallery knew nothing, that somehow that's the end of the story. I don't believe that's the case. But if you're going to limit discovery, then I have nothing to say.

THE COURT: I'm not necessarily inviting reargument on it, but is it your position that if Coe-Kerr -- if the entrustment provision applies to the transfer to the Coe-Kerr Gallery and Coe-Kerr Gallery took good title from Mr. Ramus because there were no red flags at that point -- and I recognize that we don't yet know all the facts surrounding that, so I'm just asking you to assume as a hypothetical that Coe-Kerr Gallery -- there were no red flags to put them on notice that Mr. Ramus didn't have the rights to sell the painting. Is it your position that if fifteen years later or

ten years later Mr. Hamada, when he bought the painting should have -- or knew that Mr. Ramus, that there was a defect at some point in the chain along the way, that that transfer -- that Mr. Hamada doesn't necessarily have full rights to the painting and that your client would, notwithstanding the entrustment and notwithstanding the valid sale and transfer of title to Coe-Kerr?

I guess that's the part I'm missing. It may be that -- I just don't know why if there's a valid transfer to Coe-Kerr and Coe-Kerr acquires good title to the painting somehow your client's interest in the painting can be restored if a later buyer down the chain has reason to think that there was a suspect transfer along the way.

MR. ALTMAN: I think, respectfully, I think you're making a circular argument. If indeed -- if you conclude that the Coe-Kerr Gallery got good title then, yes, everybody else gets good title after that. But that's -- that doesn't mean that it automatically follows that Hamada had no obligation to do anything to find out what the story was. It doesn't necessarily preclude some kind of -- I mean I just don't -- we don't know what the story was here with Mr. Hamada. And I don't think you can automatically assume that he got good title just because of -- because of the entrustment doctrine. I'm disputing that.

THE COURT: I'm missing something because the first

thing you just said was if Coe-Kerr got good title then everyone down the line also got good title. So wouldn't that apply then to Mr. Hamada?

MR. ALTMAN: I'm not prepared to acknowledge that at this point. I just don't think that's accurate as a matter of law, your Honor. I mean we have -- we have a different set of rules under New York state law about the difficulty and possibility of somebody acquiring title to stolen property and about when the Guggenheim case very clearly says that the time doesn't run, the time never stops running, and that someone who acquires with knowledge cannot acquire -- cannot necessarily acquire good title. So I don't believe it's automatic.

THE COURT: But my question is --

MR. ALTMAN: I understand your question, your Honor.

THE COURT: A. has ownership of a painting and entrusts it to B who is a dealer in painting. B sells it to C who has no red flags to think that there's anything untoward about it but it turns out B was not actually authorized to cell it to C. So that's a breach, if you will, with respect to A. C later sells it to D who, because of interim publicity, now knows that B had sold it to C improperly. It's your position that D cannot acquire good title from C even though C had good title? And more to the point it's your position that A can then sue D? Do you follow?

MR. ALTMAN: I follow what your saying.

I cannot answer the question without knowledge of the facts as to whether D could or could not acquire good title.

THE COURT: Right. But my question is are A's rights -- so A, in our hypothetical, has no rights in interest with respect to C because C has acquired good title pursuant to the entrustment provision under the UCC, correct?

MR. ALTMAN: Yes. That's what it means to assume that the entrustment provision applies, yes.

THE COURT: But it's your position that if D then buys the painting from C and knows that the initial sale from the dealer from B to C was improper, that all of a sudden A's rights are restored and can pursue a claim against D? That is the position you're taking in this lawsuit. Am I wrong?

MR. ALTMAN: No. That's correct.

THE COURT: Okay. And do you have any authority that would support that, that A's interests here, Mr. Galin's interests, are essentially revived if it turns out the entruster provision would have applied and did apply to the transfer to the Coe-Kerr Gallery? Do you have any authority that would support that?

MR. ALTMAN: Not in front of me. But that was not the issue raised or litigated in the motion to dismiss either.

THE COURT: Actually I think it was --

MR. ALTMAN: No.

THE COURT: -- very much the issue.

MR. ALTMAN: The argument was whether the entrustment provision applied or didn't apply; and if it did apply, as you've said in the decision, whether that was an affirmative defense or part of my case in chief.

THE COURT: All right. Thank you.

Mr. Cahill, anything you want to say?

MR. CAHILL: No, your Honor. As we said in our letter, we do think that discovery should be limited. Our client -- it's is an expensive case for our client who is located in Japan and who is not an English speaker. And he has nothing to add to what we think the court has correctly identified as the central issue, which is whether there is any evidence that Coe-Kerr Gallery, B in the hypothetical, was a good faith purchaser. We think that the facts have already been pled that show that he must have been because even the plaintiff, his best friend, didn't know. But we understand and respect the court's decision that there are -- that the plaintiff has an opportunity to offer that evidence and we want to give him what we think should be a very brief time for us to find out what evidence he has and for him to uncover evidence we were thinking in the neighborhood of 60 days ought to be enough because that -- this is really a pure issue of law that can be decided, we think quickly, once these few relative facts are ascertained.

We don't know of any. We've done our best on our own

to try and learn of any evidence that could be out there. We don't think there is any. But we certainly -- the court has given the plaintiff an opportunity. We think 60 days ought to be enough time to do that.

THE COURT: All right. I think for the record Coe-Kerr was C in my hypothetical.

MR. CAHILL: I apologize. That's right. Coe-Kerr was C.

THE COURT: I agree and I'm going to limit discovery in the first instance to the circumstances surrounding the transfer to Coe-Kerr Gallery.

It is my view, for the reasons I articulated in my opinion and as just discussed with Mr. Altman, that if the entruster provision does apply to that transfer and Coe-Kerr Gallery acquired good title, that Mr. Galin as no valid claim with respect to Mr. Hamada notwithstanding Mr. Hamada's knowledge or lack thereof of the earlier circumstances surrounding Mr. Ramus. So I will limit it to that.

Let's talk about what that would involve. As I understand it, Coe-Kerr Gallery is no longer in business but all of its papers have been entrusted, no pun intended, to some other entity. Am I correct in recalling that?

MR. CAHILL: Yes, your Honor. Our understanding is, I don't know if it's all of the papers, but some of the papers of the Coe-Kerr Gallery are at the Frick library which has a well

regarded archive of fine art material. So, while we don't believe there's anything based on what we've been able to find out so far, we don't think there's anything about this transaction there. We do know that there are Coe-Kerr papers at the Frick.

MR. ALTMAN: Your Honor. I can speak to that. I have had it investigated. And, yes, some of the papers of the Coe-Kerr Gallery are in the Frick library. However, this particular transaction and other transactions involving Andrew Wyeth paintings don't seem to be quite available.

There are principals of the Coe-Kerr Gallery who are still alive, to my knowledge. And so I think it's going to be somewhat tedious and difficult to track these people down. They are all nonparties. And so there's quite a burden here to establish what actually happened with this transaction.

If the documents are not in existence in the Frick, frankly, I don't know where they might be so I'm going to have to find out. So I would very much ask for more than 60 days to figure this out.

If you're limiting me to discovery, which is essentially from third parties who I have no control over, that's not going to be easy. So, I would ask for a reasonable amount of time. I don't think 60 days is sufficient.

THE COURT: What do you think is appropriate and what do you think discovery will involve?

MR. ALTMAN: Well, it may involve depositions of anybody who is left no knows anything about this transaction at the Coe-Kerr Gallery. It may involve a deposition of Mr. Ramus who is not in New York. And I don't know who else it might be. There are some other people that Mr. Galin has identified to me and I will have to do some informal investigation and find out: A, what they know; and B, if they're willing to talk to me. So if they're not I'll have to make arrangements for out-of-jurisdiction subpoenas and so forth. So I would say 120, 150 days, something like that.

THE COURT: You're not getting 150 for sure.

MR. ALTMAN: Of course, I understand. But the summer is coming too, so I don't know where people are and, you know, the art world disappears during the summer.

THE COURT: It's good to be in the art world, I guess.

Expert discovery?

MR. ALTMAN: Yes. There may also be experts as to -- every case that I've examined involving the entrustment doctrine seems to make -- seems to suggest that the policy and practice involving transactions of this sort are matters of expert opinion as to whether someone acted properly, someone acted with due diligence, even in the context of the entrustment doctrine. These tend to be rather fact intensive and also matters of opinion as to whether someone acted properly or not in the process of entering into a transaction

of this magnitude.

So, there may very well be experts is what I'm saying.

THE COURT: Mr. Cahill.

MR. CAHILL: Yes. My understanding, the Coe-Kerr Gallery was not very big gallery at the time and that there would be only one or perhaps two people; and even if they were an element time memory would not have the records of the Coe-Kerr Gallery because they weren't owners, they were the employees and are likely to say that they have no recollection of what -- although I'm not sneering at, you know, just prices speaking, but it was not even then a blockbuster transaction for an art gallery in New York.

So as far as I know, there would not be a lot of people. And what Mr. Ramus would have to say would likely be inadmissible and hearsay.

So I think -- I just don't think there is going to be that much discovery.

As far as expert discovery, there are cases in which experts would have to opine. But here we have, in the pleading, that there was -- that the main issue that experts opine on is whether value was paid. And that's been pled that value was properly pled here. And it is possible, in one of the cases cited in the court's decision which we'd be happy to evolve, Judge Scheindlin discouraged us from doing expert discovery even though there were valuation opinions. And,

again, if there really -- as there's been no discovery, and there's been nothing proffered about what could even be the evidence of wrongdoing by Coe-Kerr Gallery, we think that it's premature to ask the parties to get experts. And the timing, again, we leave it to the court's discretion. But we would argue that the investigation that's being talked about should have been done frankly not only before this conference but before the pleading to determine that there was some kind of bad faith on the part of the Coe-Kerr Gallery.

THE COURT: Is Mr. Altman not correct that most of these cases do delve into what the industry norms are; that is to say, to the extent that Coe-Kerr is a dealer that the industry norms did require them to do some due diligence and figure out Mr. Ramus's rights or lack thereof to sell the painting, then he might have a valid argument that there were sufficient red flags to deny the entruster provisions application.

MR. CAHILL: Yes, your Honor. Indeed most of the cases do involve that. But there are facts pled that give rise to a right to do that expert discovery: The price was too low, the seller was known to be in deep financial distress.

Here we have the plaintiff pleading that the price was a fair price. We have the plaintiff pleading that even he, his best friend, had no idea for years after this sale that Mr. Ramus was having any difficulty. And he told People

magazine even after he was indicted that he was a stellar person. So to me it puts the cart before the horse. You have to show some basis for needing an expert to opine before the parties should have to incur the time and expense of retaining experts.

If the court was inclined to allow that, we would suggest that this is a case where expert discovery should either be concurrent or the schedule the court set should follow rapidly from the limited discovery. The retention of experts and expert depositions should be at least subject to review at that time and then done either concurrently or quickly thereafter.

THE COURT: Here's what I'm going to do. I'm going to set a deadline for the completion of fact discovery, again limited to the issues surrounding the transfer to the Coe-Kerr Gallery, of September 9, which I think is an adequate amount of time, given the limited scope of discovery I think frankly is more time than one would really need. If it turns out that August proves that impossible or difficult, you can certainly let me know that and I will try to be reasonable but you should try to complete things by that date.

Right now I'm going to reserve judgment on whether expert discovery is appropriate here. I think what I will do is if you think expert discovery is appropriate, Mr. Altman, I want a letter from you by August 23. And I will give

Mr. Cahill until August 26 to respond to make any arguments as to why expert discovery is not appropriate. And then I will resolve the issue before the close of fact discovery and let you know whether we will or won't. But the bottomline is I think you'll have to make a case for why you think, given the facts that have come to light in connection with fact discovery, that you think it is relevant and material and would inform and be material for purposes of summary judgment practices on the entruster provision.

I'll have you then back here shortly after the close of fact discovery on September 13 at 4:15 in the afternoon at which point we'll talk about what's next, presumably summary judgment practice on the issues that we've been discussing, and we will go from there.

I told you to listen earlier to my spiel about deadlines and discovery disputes. I assume you did and I don't need to repeat them now.

MR. CAHILL: That's correct, your Honor.

THE COURT: All right. Very good.

Let's talk about settlement and then we can adjourn. Any discussions of settlement? Is there anything I can do to facilitate those discussions and avoid the need for any discovery or expensive discovery and motion practice here?

MR. CAHILL: Your Honor, Mr. Altman and I are not strangers. We are colleagues as well as we are adversaries and

we know each other well. It's a small art law bar, if you will. So we've had a number of discussions and it's my view -- of course, he's welcome to share his -- that we've done as well as we're likely to do on our own and that involving either a magistrate or a court mediator and the, even the limited expense that goes along with that would probably not be productive in our view given the settlement discussions we have had.

THE COURT: So it would not be productive?

MR. CAHILL: It would not be productive mediation in our view.

THE COURT: All right.

MR. CAHILL: Generally I'm a big fan of mediation but here I think we've tried and we -- even a terrific mediator probably won't get us where we need to be. But I'm happy to listen to him and I'm not constitutionally opposed to mediation; quite the contrary.

THE COURT: Mr. Altman.

MR. ALTMAN: I'm willing to do it. There's been a what I consider relatively nominal offer. But I also think that maybe we don't know enough at this point to be able to -- and that we can't -- we don't have sufficient cards to put on the table to each of us try to convince the other.

There are a couple of other points, if I might, before we close, which I'd like to bring up.

One is the issue of the burden of proof here. Maybe it can be discussed. The idea here is that, where you're ruling is that the entrustment doctrine is an affirmative defense. And as far as I can see that's a burden -- any affirmative defense is a burden on the defendant, not on the plaintiff. Yet, I'm the one who is going to have to prove a negative in the sense that the transaction was not an entrustment. So I think -- I'd like to discuss that with Mr. Cahill and have your Honor react to what I'm saying.

THE COURT: Why don't you discuss it and you can figure it out. But I'm certainly on record saying that the weight of authority is that it is a defense and normally a defendant would bear the burden of proving a defense. I haven't gotten into the particulars. It may be that the red flags component of the doctrine is one that the plaintiff would bear the burden of showing that there were red flags sufficient to defeat the defense. I don't know the answer to that but why don't you guys look into it, discuss it. I think it probably doesn't matter for present purposes. But it may ultimately matter, obviously, when it comes to summary judgment and it may inform your settlement discussions if you have them.

MR. ALTMAN: The other issue is whether there is a jury right here, and maybe that's premature but I bring it up because your Honor apparently -- your Honor has a rule regarding summary judgment motions in bench trials, if I recall

correctly.

THE COURT: I have a default practice. I think regardless I would deviate from it here and have summary judgment practice on -- well, I don't know. That's something that we'll discuss at the September conference, I guess.

My general practice is to go to straight to trial in bench trial situations because the submissions are quite similar to summary judgment submissions. I take direct testimony by affidavit. And going to trial, as opposed to summary judgment, just tends to make things more efficient. Maybe it would make sense to do that here and go directly to trial on the limited issue of the entruster provision, if that's a legal issue for me to decide -- or not a legal issue but an issue for me to decide. But we can discuss that. Why don't you discuss it with each other in advance of that conference. And you can come and let me know whether you think it would make sense to have summary judgment practice or, if it is a bench trial issue, then whether it makes sense to go directly to trial.

MR. ALTMAN: I should say that I am perfectly willing to go to mediation. So I do -- it does take two, but I should say for the record that I'm perfectly willing to bring in a third party see what they can accomplish.

THE COURT: I'll tell you what. Here's what I will do on that score.

Mr. Cahill, did you have anything to add.

MR. CAHILL: One of my principal concerns about mediation is that my client is a non-English speaker who is located in Japan. To the extent -- very often magistrate judges ask for in-person appearances, submissions, etc. That's my principal concern.

MR. ALTMAN: So my client is in Tennessee so it sort of cuts against both of us. Maybe that makes it more difficult, I don't know, because it would only be the lawyers talking to each other, but I leave that to your Honor's judgment.

THE COURT: Why don't we do this. I'm going to let it shakeout for a little bit and leave you guys to continue discussing things with one another. I certainly think at some point it will make sense to go to probably the assigned magistrate judge and have settlement discussions. Most of them do have provisions that excuse the presence of principals if they are not local and where a hardship would be involved. At the same time, maybe there's also a time in the next few months where your principals, your clients will actually be present in New York and you could have a conference more easily and you should think about that and discuss it with one another.

The bottomline is I'll let things shakeout for a little while and ask you to just update me by July 29 whether you think it would be appropriate to refer the case to the

assigned magistrate judge or the mediation program. I would think the magistrate judge, if either, I would be inclined to send you to a magistrate judge, and let me know if you agree; and if so, what timing you think would be appropriate for a settlement conference and that will insure that you continue to discuss it with one another and that you give it some thought.

Anything else?

MR. CAHILL: Not from defense, your Honor.

MR. ALTMAN: Not from me, Judge.

THE COURT: Thank you very much. I'll enter a case management plan consistent with what we have done today. We are adjourned. Thank you.

(Adjourned)